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Nelson v. State Respondent's Brief Dckt. 40661

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY JOSEPH NELSON, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Nos. 40661, 40828 Ada Co. Case Nos. CV-2011-2496, CV-2012-12194

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Gregory Nelson appeals from the district court's orders summarily dismissing his fifth and sixth petitions for post-conviction relief.

Statement Of Facts And Course Of Proceedings

In affirming Nelson's convictions and sentences on direct appeal, the Idaho Court of Appeals described the underlying facts of Nelson's conviction as follows:

> According to the evidence presented at trial, appellant Gregory J. Nelson went to the home of K.M., a ten-year-old girl who lived in his neighborhood. Nelson knew that K.M.'s parents would not be home that morning because her father was in Alaska and her mother was at work. When Nelson arrived, he offered to pay K.M. twenty dollars if she would come and clean the travel trailer in which he lived. After an initial refusal, K.M. ultimately agreed, and Nelson drove her to his trailer. Shortly after they arrived and K.M. began cleaning, Nelson told K.M. that he was a doctor and that he wanted her to remove her shirt. When she refused, he knocked her down on the bed, held a pillow over her face until she agreed to remove her clothing, and then sexually molested her. After the incident, Nelson drove K.M. back to her house. Once there, K.M. immediately told her two brothers that Nelson had hurt her, and they took her to the house of a neighbor. The neighbor telephoned K.M.'s mother, who arrived a few minutes later as did police and paramedics. K.M. was then taken to a hospital where she was examined by a physician.

State v. Nelson, 131 Idaho 210, 213, 953 P.2d 650, 653 (Ct. App. 1998).

A jury found Nelson guilty of first-degree kidnapping and lewd conduct with a minor. See id. The district court denied Nelson's motion for a new trial, and imposed concurrent fixed life sentences. See id. Nelson raised ten issues on direct appeal, including a claim that the district court erred in admitting physical

evidence for which, Nelson asserted, the state failed to establish an adequate chain of custody. Id. The Idaho Court of Appeals affirmed Nelson's conviction and sentences. Id.

Over the next several years, Nelson filed four unsuccessful petitions for post-conviction relief, asserting dozens of various claims. See #40661 R., pp.259-260; Nelson v. State, 2003 Unpublished Opinion No. 846, Docket No. 27266 (Idaho App., September 22, 2003); Nelson v. State, 2005 Unpublished Opinion No. 524, Docket No. 30771 (Idaho App., June 28, 2005).

In 2011, Nelson filed a fifth petition for post-conviction relief, requesting DNA testing of the rape kit and underwear admitted as evidence at the underlying trial. (#40661 R., pp.7-52.) The district court appointed counsel to represent Nelson. (#40661 3/3/11 Tr., p.13, L.9 – p.14, L.19.) Pursuant to stipulation between the parties, the district court ordered the requested testing. (#40661 R., pp.62-63, 67-69, 82.) The testing revealed that Nelson and his paternal relatives could not be excluded as the source of the male DNA profile obtained from the relevant evidence. (#40661, Respondent's exhibit 1.) The report summarized:

> Item 1 (Vaginal swabs):
>
> The partial T-STR DNA profile from the epithelial fraction of this item matches the Y-STR DNA profile obtained from Gregory Nelson. Gregory Nelson and his paternal relatives cannot be excluded as the source of the male DNA identified on this item. The Y-STR DNA profile was observed 13 times in a population of 10986 individuals. Applying the 95% confident interval results in a frequency of 0.00188, which is equivalent to approximately 1 in every 532 individuals. Analysis for the presence of additional male contributors was inconclusive.
>
> No Y-STR DNA profile was obtained from the sperm fraction.

Item 2 (Anal swabs):

> The partial T-STR DNA profile from the epithelial fraction of this item matches the Y-STR DNA profile obtained from Gregory Nelson. Gregory Nelson and his paternal relatives cannot be excluded as the source of the male DNA identified on this item. The Y-STR DNA profile was not observed in a population of 10986 individuals. Applying the 95% confident interval results in a frequency of 0.000273, which is equivalent to approximately 1 in every 3663 individuals. Analysis for the presence of additional male contributors was inconclusive.
>
> No Y-STR DNA profile was obtained from the sperm fraction.

(Id.)

Shortly after the testing was completed, the state answered Nelson's post-conviction petition and moved for its dismissal based upon the results of the testing. (#40661 R., pp.90-92, 179-182.) Nelson filed *pro se* motions seeking to replace his counsel. (#40661 R., pp.93-113.) He also filed a *pro se* supplemental motion for post-conviction relief, supporting affidavits, and other filings, in which he appeared to assert that the Y-STR DNA analysis was insufficient because such testing cannot be linked to a specific individual, but is instead useful only in excluding individuals as DNA contributors. (#40661 R., pp.117-136, 170-174, 187-192, 227-232.) Nelson requested that "full STR" testing additionally be conducted. (Id.) STR testing, unlike Y-STR testing, Nelson asserted, would seek to identify the specific contributor of the DNA samples, and could be compared against the CODIS national DNA database. (Id.)

The district court denied Nelson's motion for substitute counsel, and requested that Nelson's counsel respond to the state's motion for summary

dismissal. (#40661 R., pp.197-201; see also #40828 7/5/12 Tr., p.36, L.24 – p.42, L.7.) The district court also barred Nelson from continuing to file *pro se* documents. (#40661 R., pp.236-238.) Nelson's counsel filed an objection to the state's motion for summary dismissal, and requested that the court consider Nelson's previous *pro se* filings in which Nelson requested additional testing. (#40661 R., pp.253-254.) The district court considered the prior filings and then summarily dismissed Nelson's fifth post-conviction petition. (#40661 R., pp.259-270.)

In the course of his fifth post-conviction petition proceedings, Nelson asserted that evidence from his underlying trial had been tampered with. (#40661 R., pp.117-136, 170-174, 187-192, 197-200, 227-232.) The district court stayed consideration of this claim pending the outcome of Nelson's fifth petition. (#40661 R., pp.197-201.) Nelson then formally asserted this claim in a sixth petition for post-conviction relief. (#40828 R., pp.6-75.) Nelson asserted that inconsistent labeling and descriptions of various exhibits demonstrated evidence tampering. (Id.) The district court entered a notice of intent to summarily dismiss the petition on the grounds that the tampering claim was frivolous, and the claim could have been and/or was previously raised on direct appeal or in Nelson's original post-conviction petition. (#40828 R., pp.76-80.) Nelson then moved for the appointment of counsel, and submitted additional argument. (#40828 R., pp.81-89, 97-114.) The district court denied Nelson's motion for appointment of counsel and summarily dismissed Nelson's sixth petition. (#40828 R., pp.115-126.)

Nelson timely appealed from the district court's summary dismissal of his fifth and sixth petitions for post-conviction relief. (#40661 R., pp.271-274; #40828 R., pp.127-130.) The Idaho Supreme Court granted Nelson's motion to consolidate the two appeals. (6/10/13 Order.)

ISSUES

Nelson states the issues on appeal as:

A: In No. 40661: Did the District Court err in not ordering additional DNA testing when the YSTR testing did not identify Mr. Nelson as the source of the male DNA but also did not exclude him?

B: In No. 40828: Did the Court err in failing to grant Mr. Nelson's motion for appointment of counsel, especially given the absence of advance notice of the reasons for the court's denial?

(Appellant's brief, p.2)

The state rephrases the issues on appeal as:

1. Has Nelson failed to show that the district court erred in denying his request for additional DNA testing?

2. Has Nelson failed to show that the district court erred in denying his motion for counsel with regard to his sixth post-conviction petition?

ARGUMENT

I.
Nelson Has Failed To Show That The District Court Erred In Denying His Request For Additional DNA Testing

A. Introduction

Nelson contends that the district court erred by denying his request for additional DNA testing of relevant evidence associated with his underlying trial and conviction. (Appellant's brief, pp.3-12.) However, the record reveals that Nelson failed to make the required showing that the additional testing had the scientific potential to produce new, noncumulative evidence that would show that it was more probable than not that Nelson was innocent.

B. Standard Of Review

On review of a dismissal of a post-conviction application, the appellate court will review the entire record to determine if there is a genuine issue of material fact that, if resolved in petitioner's favor, would require that relief be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id.

C. Nelson Was Not Entitled To Additional DNA Testing

Under Idaho Code § 19–4902, a petitioner may file a post-conviction petition seeking DNA testing on evidence that was secured in relation to the trial that resulted in his conviction if the evidence was not subjected to the requested DNA testing because the technology was not available at the time of the trial. I.C. § 19–4902(b). The petitioner must present a *prima facie* claim that identity

was at issue in the trial and that the evidence was subject to a sufficient chain of custody.[1] I.C. § 19–4902(c). The district court must then allow the testing under reasonable conditions if the district court determines that: "(1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence." I.C. § 19–4902(e). In the event testing is conducted, the court shall "order the appropriate relief" if the results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense. I.C. § 19–4902(f)

In this case, the parties stipulated to DNA testing. (#40661 R., pp.62-63, 67-69.) The stipulation and subsequent initial district court order did not specify what type of testing would be conducted. (Id.) However, at a pre-test hearing concerning the question of which entity was to pay for the testing, Idaho State Lab DNA supervisor Cynthia Cunnington stated that "the testing that is being requested in this case is referred to as Y[-]STR testing." (#40661 2/2/12 Tr., p.16, Ls.10-20; p.17, Ls.19-22.) Nelson did not object to or attempt to clarify this

[1] Nelson was thus required to make a *prima facie* showing that "[t]he evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect." I.C. § 19–4902(c)(2). While the state did not dispute that Nelson made such a showing below (#40661 R., pp.51, 91), Nelson has *also* contradictorily argued, both on direct appeal and in his sixth post-conviction petition (see Sec. II, below), that the rape kit *was* tampered with and/or materially altered in some way. In fact, Nelson expressed at a hearing his view that "had [he] been made fully aware of the content of the [facts underlying his tampering allegation], [he] would have demanded that the DNA testing stop because it's pointless." (#40828 7/5/12 Tr., p.28, L.20 – p.29, L.4.)

characterization. (See generally #40661 2/2/12 Tr.) Following this hearing, the district court specifically ordered that Y-STR DNA testing be conducted, and that Nelson pay half the cost of such testing up to $3,000. (#40661 R., p.82.)

Cunnington went on to explain some of the differences between Y-STR testing, which was conducted in this case, and STR testing. (#40661 2/2/12 Tr., p.17, L.2. - p.20, L.12.) STR testing, Cunnington explained, "looks at DNA that everybody has, males, females," and "is looking at those unique portions of DNA to determine whether or not a specific individual could be the source of a given body fluid associated with the case." (#40661 2/2/12 Tr., p.17, Ls.2-18.) As other state appellate courts have recognized, however, "STR DNA analysis is problematic...when forensic scientists are confronted with a mixed [male and female] DNA sample." Moore v. Commonwealth, 357 S.W.3d 470, 492, n.16 (Ky. 2011) (quoting State v. Calleia, 997 A.2d 1051, 1063 (N.J. Super. Ct. App. Div. 2010)). Such a mixed STR DNA profile "will have a combination of both individuals' DNA patterns and it is not possible to attribute which traits go with which person. Further, one individual's profile often overwhelms the other and renders it un-detectible." Id.

Y-STR testing, Cunnington explained, "is specific for males." (#40661 2/2/12 Tr., p.17, Ls.19-25.) Y-STR testing is therefore commonly used in sexual battery cases where it is advantageous to separate male DNA from female DNA. See Commonwealth v. Linton, 924 N.E.2d 722, 732 n.8 (2010) (referencing testifying DNA analyst who "explained that Y–STR testing is often used when there is a large amount of female DNA and possibly only a small amount of male

DNA [as would be the case in many sexual batteries]. In such instances, standard DNA testing may 'drown out' the male contributor's DNA because so much female DNA is present."). Thus, while Y-STR testing, unlike STR testing, cannot establish who the singular contributor of a crime scene DNA source is, it may be more effective in *excluding* (and thus exonerating) innocent individuals in male/female sexual assault cases.

In this case, Y-STR DNA testing revealed that Nelson and his paternal relatives could not be excluded as the source of the DNA profile identified on the relevant evidence from the underlying trial. (#40661, Respondent's exhibit 1.) Applying a 95% confident interval, the male DNA profile obtained from the vaginal swab of the victim is found in approximately 1 in every 532 individuals, while the male DNA profile obtained from the anal swab of the victim is found in approximately 1 in every 3663 individuals. (Id.)

Following this testing, Nelson, through various *pro se* filings, requested that standard STR DNA testing also be conducted. (#40661 R., pp.117-136, 170-174, 187-192, 227-232.) Nelson described some of the comparative advantages and drawbacks to STR and Y-STR testing discussed above. (Id.) However, despite having an active communication with a consulting forensic scientist (see #40661, pp.254-258), Nelson did not support his request with statements from any experts asserting that in the circumstances of this case, Y-STR testing was in any way inadequate or inappropriate, or that STR testing had any reasonable probability of being favorable to Nelson in light of the Y-STR testing results already obtained.

The district court rejected Nelson's request for additional testing, concluding:

> Beyond laying the foundation for the evidence presented in Exhibits A and B to the Objection, [Nelson's] affidavit contains inadmissible hearsay, information outside the Petitioner's personal knowledge, and the Petitioner's legal conclusion, and therefore, are not considered further. To the extent that Mr. Nelson has read articles on DNA testing, even specifically cited *National Geographic* articles, he would still not qualify as an expert capable of rendering an admissible opinion under the Idaho Rules of Evidence. Therefore, hearsay statements and the Petitioner's factual and legal conclusions related to CODIS STR DNA testing in the First and Second Affidavits do not present a genuine issue of material fact that the Petitioner was not the one who committed these offenses.

(#40661 R., p.266.)

Nelson's failure to provide evidentiary support is fatal to his claim. Nelson is not entitled to engage in a fishing expedition involving multiple DNA tests. A petitioner must support such requests with admissible evidence, beyond his own opinions of the usefulness of such tests, explaining why prior testing was so flawed, and/or how additional requested testing is so potentially illuminating and not merely cumulative, as to create the scientific potential to reveal evidence demonstrating that it was more probable than not that the petitioner is innocent. See Moore, 357 S.W.3d at 491-492 (recognizing, in a case presenting a mirror image of the circumstance of the present case, that where a petitioner had already obtained STR testing, but additionally sought Y-STR testing, that petitioner must support such a claim "by expert proof about the usefulness of the proposed testing"). Nelson has failed to make such a showing.

While Nelson submitted unsworn letters from consulting forensic scientist George Schiro in support of his objection to the state's motion for summary dismissal, these letters are not helpful to Nelson's cause. Nelson submitted the Y-STR testing results to Schiro to review. (See #40661 R., pp.253-258.) In response, Schiro stated that "a review of the notes indicates that Sorenson Forensics carried out the testing properly and that the results of the test are valid," and that "[b]ased on the current state of DNA testing and the information provided so far, I will not be able to assist you with your case." (#40661 R., p.256.)

Further, in light of the results of the Y-STR test, there is no reasonable probability that additional testing would demonstrate Nelson's innocence. Notably, I.C. § 19-4902 does not require a district court to assume test results favorable to the petitioner when determining whether to order DNA testing.[2] In

[2] This distinguishes I.C. § 19-4902 from the corresponding post-conviction DNA testing statutes of several other jurisdictions which *do* expressly require the district court to assume exculpatory results when analyzing whether a petitioner has made the required materiality showing. E.g. Colo. Rev. Stat. § 18-1-413(1)(a) (a petitioner must show by a preponderance of the evidence that: (a) "*Favorable results* of the DNA testing will demonstrate the petitioner's actual innocence"); Conn. Gen. Stat. § 54-102kk(b)(1) (a court must order DNA testing if petitioner shows "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted *if exculpatory results had been obtained* through DNA testing"); 42 Pa. Stat. Ann. § 9543.1(c)(3)(ii) (petitioner must present a prima facie case demonstrating that "DNA testing of the specific evidence, *assuming exculpatory results*, would establish" actual innocence or support a lesser sentence in a capital case); Mo. Rev. Stat. § 547.035(7)(1) (petitioner must show a "reasonable probability exists that the movant would not have been convicted *if exculpatory results had been obtained* through the requested DNA testing" (emphasis added)); see also Ind. Code § 35-38-7-8(4); Ky. Rev. Stat. § 422.285(5)(a); Nev. Rev. Stat. § 176.0918(7)(a). If the Idaho legislature wished to remove the judicial determination of the likelihood of exculpatory results, it could have done so.

light of this previous testing which demonstrated some degree of certainty that he was the perpetrator, Nelson cannot show a reasonable probability that new DNA testing would produce exculpatory result.[3] Nelson thus cannot meet the materiality requirement of I.C. § 19-4902

Nelson has failed to show that any additional DNA testing had the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that he is innocent of the crimes for which he was convicted. He has therefore failed to show he is entitled to additional DNA testing, or that the district court abused its discretion in denying such testing.

II.
Nelson Has Failed To Show That The District Court Erred In Denying His Motion For Counsel With Regard To His Sixth Post-Conviction Petition

A. Introduction

Nelson contends that the district court abused its discretion by denying his motion for the appointment of counsel with regard to his sixth post-conviction petition, in which Nelson asserted that "new evidence" revealed tampering of evidence associated with his underlying trial. (Appellant's brief, pp.12-19.) In the alternative, he contends that the district court failed to provide adequate notice prior to denying his motion for appointment of counsel. (Appellant's brief, p.19.) A review of the record reveals that there was no possibility that Nelson's

[3] Additionally, it appears that the district court did not take judicial notice of the transcripts of the underlying jury trial. (See #40828 7/5/12 Tr., p.45, L.14 – p.47, L.11; #40661 R., p.200.) Thus, it is not possible from the appellate record to analyze how STR testing might have been more appropriate, or more illuminating, and not merely cumulative, relative to Y-STR testing in the context of the facts of this case.

tampering claim could be developed into a viable claim even with the assistance of counsel, and that the court therefore acted within its discretion to deny the motion. Further, the district court's notice of intent to dismiss Nelson's petition contained adequate notice of the grounds the court later utilized to deny Nelson's motion for appointment of counsel and summarily dismiss his petition.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel to represent a post-conviction petitioner pursuant to I.C. § 19-4904 is discretionary. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Plant v. State, 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2007).

C. Counsel Was Properly Denied Because Nelson's Claim Is Frivolous

Idaho Code § 19-4901(4) permits a post-conviction petitioner to seek relief on the grounds that "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

Post-conviction counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." Swader v. State, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007); see also Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004); I.C. § 19-4904. If the claims are so patently frivolous that there appears no possibility that they could be developed into a viable claim

even with the assistance of counsel, however, the court may deny the motion for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Newman v. State, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). "Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel." Gonzales v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011). Application of this standard to Nelson's tampering claim shows no error by the trial court.

The remedy available under the Uniform Post-Conviction Procedure Act ("UPCPA") "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction." I.C. § 19-4901(b). In addition, an "issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings" except under very limited circumstances. I.C. § 19-4901(b).

Additionally, all grounds for relief available to a post-conviction petitioner must be raised in his original, supplemental or amended application. I.C. § 19-4908. Any ground not previously raised is waived unless the court finds "sufficient reason" for why the claim was not asserted or was inadequately raised previously. Id.

In his sixth post-conviction petition, Nelson asserted that inconsistent labeling and descriptions of various exhibits demonstrated evidence tampering. (#40828 R., pp.6-75.) On appeal, Nelson has described these alleged inconsistencies as follows:

> The petition alleged, as has been noted above, that an inventory of the contents of the rape kit was conducted in No. 40661, pursuant to the stipulation of the parties. A copy of that inventory (called a "Forensic Biology Report") dated June 28, 2011, and signed by Cynthia Cunnington, was attached as an Exhibit to the petition. The inventory describes Item Q-13 as "A glue-sealed white envelope containing two wooden toothpicks." A pre-trial inventory of the rape kit by the FBI described the contents of the rape kit to be "[a] white envelope labeled 'Step 1 – Special Evidence (if applicable) use swab for dried secretions or genital swabbings[.]'" The inventory also states, "I marked this Q-13-40328002S YB and initialed and dated it. Envelope sealed." Mr. Nelson alleged the FBI forensic scientist Frederick Whitehurst and a nurse testified at the trial that the Q-13 contained "genital swabbings" and not toothpicks. Mr. Nelson also alleged that the lab notes of Forensic Scientist Ann Bradley indicated that she opened Q-13 prior to trial and found the envelope contained a[n] "external genital swab."
>
> ...
>
> There is also a discrepancy between the various descriptions of Q-11. The Sorenson Forensic notes say "Q11...pubic hair combings," which would be consistent with Fredrick Whitehurst's testimony at trial. However, the June 28, 2011, inventory reports the contents of Q-11 as "moist genital swabs."
>
> Finally, Mr. Nelson alleged that State's Exhibit 6, K.M.'s underwear, was tampered with because the descriptions of the exhibit do not match in that some witnesses at trial did not mention the exhibit had a cutting from the crotch while other inventories did mention a cutting.

(Appellant's brief, pp.12-14 (citations omitted); see also #40828 R., pp.6-75.)

Nelson presented his concerns about these apparent inconsistencies to consulting forensic scientist George Schiro. (#40661 R., pp.257-258.) Schiro responded and dispelled Nelson's tampering claims, stating, "[U]pon review of the documents that you sent to me, I do not think that there that was tampering of the rape kit contents." (Id.) With regard to the apparent labeling discrepancy involving exhibit Q13, Schiro wrote, "[i]t has been my experience that some rape

kit manufactures include a muti-purpose envelope to collect additional evidence that might be present. Based on the descriptions, this envelope could have been used to collect 'special evidence,' such as fingernail scrapings, dried secretions, and/or genital swabbings. The toothpicks would have been to collect fingernail scrapings." (Id.) With regard to the apparent labeling discrepancy involving exhibit Q11, Schiro wrote, "The Idaho State Police Forensic Services' description of Q11 is obviously different than the FBI and Sorenson Forensics' description of Q11; however, this could simply be a mistake on the report that has made its way through the system. I have seen similar mistakes on finalized reports before." (Id.)

After providing notice, and after denying Nelson's motion for appointment of counsel, the district court summarily dismissed Nelson's sixth post-conviction petition. (#40828 R., pp.76-89, 115-126.) The court concluded that Nelson's tampering claim was "frivolous, successive and/or waived." (#40828 R., pp.119-124.)

A review of the record supports the district court's determination that Nelson's tampering claim was so patently frivolous that there existed no possibility that it could be developed into a viable claim even with the assistance of counsel. The claim is entirely speculative. Nelson has presented no substantive evidence of tampering, or evidence that the rape kit was inappropriately opened or altered in any way. The fact that individuals working for different entities described and inventoried evidence differently over a number of years does not itself demonstrate any reasonable probability that any

tampering of evidence occurred. Additionally, the state did not even utilize DNA testing to secure Nelson's underlying conviction (see #40661 R., pp.90-91), and instead appeared to rely primarily on the victim's testimony. Nelson, 131 Idaho at 219, P.2d at 659. Nelson has not even attempted to speculate how any "tampering" of evidence contributed to his convictions.

The district court's conclusion that Nelson waived the tampering claim by failing to assert it on direct appeal or in his initial post-conviction petition is also supported by the record. Nelson has not shown he lacked access to the relevant evidence at the time of trial and shortly afterward. In fact, on direct appeal, Nelson made a similar and unsuccessful chain of custody claim based upon apparently inconsistent descriptions of admitted evidence from the rape kit. Id. at 216-217, 953 P.2d at 656-657. While it is true that Nelson did not have access to the Sorenson Forensic or Cunnington notes and written inventories (and their apparent inconsistencies with pre-trial notes and inventories) until 2011 or 2012, those latter notes themselves, which merely describe previously admitted evidence, do not constitute "material facts" that create any possibility of a successful claim.

The failure to present any admissible, non-conclusory evidence on this claim rendered it frivolous. The claim is also waived due to Nelson's failure to raise it previously. Nelson has therefore failed to show error by the district court in either dismissing his petition or denying his motion for appointment of counsel.

D. The District Court Provided Adequate Notice Prior To Denying Nelson's Motion For Appointment Of Counsel, And Summarily Dismissing His Sixth Post-Conviction Petition

In the alternative, Nelson contends that the district court failed to provide him adequate notice prior to denying his motion for appointment of counsel with regard to his sixth post-conviction petition. (Appellant's brief, pp.19-20.) Nelson's contention fails because the district court's notice of intent to dismiss the petition contained adequate notice of the grounds the court later utilized to deny Nelson's motion for appointment of counsel and summarily dismiss his petition.

"When the court considering the petition for post-conviction relief is contemplating dismissal *sua sponte*, it must notify the parties of its intention to dismiss and must provide its reasons for the potential dismissal." Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993) (citations omitted); see also I.C. § 19-4906(b). The purpose of the notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Martinez v. State, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).

In this case, the district court set forth three proposed grounds for dismissal in its notice of intent to summarily dismiss Nelson's petition: (1) Nelson's tampering claim was frivolous; (2) Nelson waived the tampering claim by failing to present it on direct appeal; and (3) Nelson waived the tampering

claim by failing to present in his initial post-conviction petition. (#40828 R., pp.76-80.) With regard to the ground that Nelson's claim was frivolous, (i.e., that there was no possibility it could be developed into a viable claim), the court further opined that Nelson failed to show that the "new evidence" was "not previously presented and heard," as required by I.C. § 19-4901(b), and that Nelson's own consulting forensic scientist did not believe the rape kit contents had been tampered with. (Id.) The district court's subsequent summary dismissal order referenced each of these three grounds and associated sub-grounds, including I.C. § 19-4901(b), and the letter from Nelson's consulting forensic scientist. (#40828 R., pp.119-123.) In fact, significant portions of the district court's notice and dismissal order are identical. (Compare #40828 R., pp.76-80 with pp.119-123.) Additionally, the district court's order denying Nelson's motion for appointment of counsel also referenced the court's conclusion that Nelson's tampering claim was frivolous, in that it did not appear to give rise to the possibility of a valid claim.[4] (#40828 R., pp.115-118.) Because

[4] Nelson relies on Brown v. State, 135 Idaho 676, 23 P.3d 138 (2001), for his contention that a district court must provide adequate notice for not only its summary dismissal of a petition, but also for its denial of a motion for appointment of counsel. (Appellant's brief, p.19.) In the present case, after providing notice of its intent to summarily dismiss Nelson's petition, the district court entered separate orders, on the same day, denying Nelson's motion for appointment of counsel and summarily dismissing his petition. (#40828 R., pp.115-123.) Nelson appears to contend that even if the district court's dismissal order referenced the same grounds as were contained in the court's notice of intent to dismiss, the court still erred if those same grounds did not *also* appear in the court's order denying Nelson's motion for the appointment of counsel. The state submits that Brown does not compel such a distinction. Clearly, the district court in the present case both denied Nelson's motion for appointment of counsel, and summarily dismissed his petition, because it found that Nelson's tampering claim was frivolous and/or waived. The two orders individually and

the district court's notice of intent to dismiss the petition contained adequate notice of the grounds the court later utilized to deny Nelson's motion for appointment of counsel and summarily dismiss his petition, Nelson has failed to show error.

Further, even if the district court's notice of dismissal was somehow inadequate, any such error was harmless. If a petitioner is "not left with an 'invisible target' and is able to respond in a meaningful way to the district court's notice of intent to dismiss," then any lack of adequate notice is harmless. Baker v. State, 142 Idaho 411, 422-423, 128 P.3d 948, 958-959 (Ct. App. 2005); see also Franck-Teel v. State, 143 Idaho 664, 671, 152 P.3d 25, 32 (Ct. App. 2006) ("Nevertheless, if Franck-Teel's response to the state's motion for summary dismissal reveals that she understood the basis for dismissal..., then we will conclude that the inadequacy of notice was harmless error.").

In this case, Nelson responded to the district court's notice of intent to dismiss by filing a motion for appointment of counsel and supporting affidavits. (#40828 R., pp.81-114.) In the affidavits, Nelson responded to the district court's proposed grounds for dismissal and continued to argue the merits of his claim. (Id.) Specifically, he argued that he was not aware of the full contours of the tampering claim until 2012. (Id.) On appeal, Nelson does not attempt to explain what additional argument or evidence he would have provided if only the district court had provided a more substantial notice of dismissal. Therefore, even to the extent the district court's notice was inadequate, any such error was harmless.

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collectively referenced substantially the same grounds that were contained in the district court's notice of intent to dismiss.

The district court's notice of intent to dismiss was sufficient to put Nelson on notice that it intended to deny his motion for appointment of counsel and summarily dismiss his sixth post-conviction petition. Further, even if the district court's notice was somehow inadequate, any such error was harmless. This Court should therefore affirm the district court's order denying Nelson's motion for appointment of counsel, and it summary dismissal of the petition.

CONCLUSION

The state respectfully requests that this Court affirm the district court's orders denying Nelson's fifth and sixth petitions for post-conviction relief, and its order denying his motion for appointment of counsel with regard to his sixth petition.

DATED this 13th day of March, 2014.

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of March, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Dennis Benjamin
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MWO/pm